APPENDIX B

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION - (CATA) -IN RESPONSE TO THE INITIAL REGULATORY FLEXIBILITY ANALYSIS (IRFA)

CS Docket No. 95-184

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	CS Docket No. 95-184
Telecommunications Service	)	
Inside Wiring	)	
	)	
Customer Premises Equipment	)	

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION - (CATA) - IN RESPONSE TO THE INITIAL REGULATORY FLEXIBILITY ANALYSIS (IRFA)

The Cable Telecommunications Association (CATA) hereby submits its comments in the above-captioned proceeding specifically responding to the "initial regulatory flexibility analysis" (IRFA) which is required pursuant to Section 603 of the Regulatory Flexibility Act. CATA is a national trade association of cable television operators. Almost all major cable television operators are members of the association, including all of the "Top 10" multiple system operators (MSOs). CATA, however, was originally formed by the "smaller" cable television operators, and it has always been one of CATA's mandates to protect the interests of those operators.

The IRFA in this proceeding is indicative of a long trend at the Commission which adversely impacts all small entities trying to deal with the Commission and its rulemaking process. The Commission's own words tell the tale. In paragraph 79 it states that the objective of this proceeding is to:

> "...explore the development of new cable and telephony service rules in the following areas in light of converging technology: demarcation point, means of connection, simple and complex residential and non-residential wiring, installation, maintenance, access and ownership of inside wiring, compensation, dual regulation and service provider access."

To suggest that this litany of exploration is daunting would be an understatement. In fact, the "Rulemaking" includes AT LEAST 140 separate questions! It specifically recognizes that there is a convergence of technologies, or at least the offering of services that are regulated in different ways and that many complications and apparent conflicts in current rules thus appear to be arising. Yet, in paragraph 83, the Commission states: "Federal Rules which Overlap, Duplicate or Conflict with these Rules. None." And in paragraph 82: "Reporting, Recordkeeping and Other Compliance Requirements. None." Paragraph 81: "...The proposals, if adopted, will not have a significant effect on a substantial number of small entities." And

finally, paragraph 84: "Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives. None."

NONE? There is a certain surrealistic quality to even reading this so-called "Initial Regulatory Flexibility Analysis." It is not an analysis. It cannot be. The Commission staff could not possibly analyze and attempt to ameliorate the effects of newly proposed rules on small entities – the intent and purpose of Congressional adoption of the Regulatory Flexibility Act, because, in fact, the proceeding does not propose rules. Few, if any "rules" are specified for comment in this document. There are no "proposals" in the form of "rules". There can be no attempt to ameliorate the effects of "proposed rules" that do not exist. Thus, the IRFA is rendered meaningless. The entire Congressional purpose behind the Regulatory Flexibility Act is nullified by the issuance of such broad-brush "rulemakings." In fact, as the IRFA description makes clear, this proceeding is characterized as an "exploration" – it is more properly designated as a "Notice of Inquiry". But the Commission has almost ceased issuing Notices of Inquiry. The trend over the past several years is to go directly from explorations and musings about policy issues to the adoption of rules

in one giant step. This severely disadvantages all small entities attempting to participate in the Commission's processes.

The Commission should withdraw this "Rulemaking" and redesignate it as a "Notice of Inquiry". That is the only way all parties, large and small, can have a reasonable opportunity to comment on what the Commission is seeking information about and at the same time preserve the intent of the Administrative Procedure Act's designation of a "Rulemaking" to allow additional specific comment on any specific proposed rules that may come out of the initial "exploration". It is also the only way to breathe life back into the Regulatory Flexibility Act. Without the specificity of rules to seek comment on for the purpose of improving and perfecting them before they become law, the Commission cannot "analyze" those rules to determine and ameliorate their impact on smaller entities.

The Commission loses the benefit of the wisdom of the APA when it immediately designates items as Notices of Proposed Rulemaking. The entire theory behind first having a general inquiry to establish the theoretical need for policy changes, additions or deletions and the corresponding effectiveness of any proposed actual rules in a subsequent "rulemaking" is to allow a thorough investigation

of the concepts and then a "vetting" of proposed rules. This process allows all parties to participate.

The current process the Commission is engaging in circumvents the intent of the APA. While we are sure that the FCC's General Counsel can point to some language in this proceeding which would technically suffice the general requirements of the APA, that is not the point. We do not here legally challenge the designation. Rather we are attempting to bring to the Commission's attention the fact that its current processes are not in the public interest and particularly disserve smaller entities, and that there is an established solution to these infirmities in the Commission's practices.

The underlying purpose of the APA two-step process is lost when the Commission issues a highly complex, broad-based multi-question "exploration" as a "rulemaking" and then jumps directly to the issuance of rules. In that scenario, which has become the norm, few if any outside parties get to publicly view and comment on the actual rules that are drafted in response to the musings of the "rulemaking". No vetting takes place. The rules may or may not technically accomplish what the Commission intends. It is only after they are issued and we all attempt to apply them in the real world that the

Commission, inevitably, is forced into a series of "Reconsiderations" of the rules, as has been the case with cable rate regulations. We are now past our thirteenth "Reconsideration" in that case! This process is particularly damaging to smaller entities since they are forced into protracted legal proceedings with a constantly changing set of rules because those rules were in many cases drafted and adopted without the benefit of prior public exposure. Should the Commission continue, for example, in this proceeding to consider it a "rulemaking," despite the fact that there are virtually no "rules" drafted and proposed in the item, then we can potentially expect the issuance of "rules" in a vast array of areas covered by the item without any further effort on the part of the Commission to get specific general public comment on specific regulatory language.

Actually, that is not quite an accurate statement. SOME groups and individuals, if prior experience is any indicator, WILL see the language proposed in actual, drafted rules. Pitched battles will be waged by competing high-priced lobbyists in the offices of the various Commissioners over the specifics of what is actually being 'proposed'. The actual language will be debated by the select few, from the big law firms, the favored "consumer advocates" and the larger

companies and associations. But many will never get the opportunity to even know what those actual rules are before they are adopted. In most cases, it will be the smaller businesses, the "small entities" which are supposed to receive particular protection and consideration from such things as the Regulatory Flexibility Act who will be at a severe disadvantage. This is not the way it is supposed to be.

CATA should note here that both the Commission and particularly the Cable Services Bureau are to be commended for their continuing efforts to deal with the many issues we, and others raise with regard to the difficulties faced by small cable operators. Sincere and effective efforts have been undertaken to establish constant communication and understanding about these issues. However that cannot substitute for a return to the underlying principles of the APA which contemplate an airing of actual proposed rules before they are adopted into law. Such a return to basic, orderly, public rule making would inure to the benefit of the public, the Commission and all those who have to understand and abide by its rules.

In the instant proceeding it can only be said generally that the questions posed, if translated into specific rules, would most certainly have a massive impact on small entities. In some cases, depending

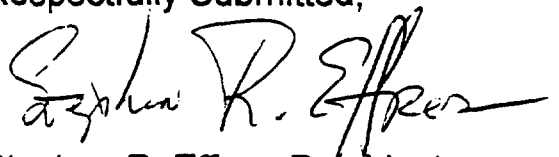
on the rule, small entities would be foreclosed from even engaging in the businesses in question. For the Commission to issue an IRFA which suggests, even in the absence of specific rules, that there would be NO particular impact specifically on small entities regarding the issues being investigated is simply not true. The Commission, by so stating, is nullifying the purpose behind the Regulatory Flexibility Act. Not intentionally, but because the staff can do nothing else given that the "Rulemaking" does not provide it, let alone commenting parties, sufficient information to intelligently answer the questions required to be responded to by the Act. Congress could not have adopted the Regulatory Flexibility Act intending that it not be adhered to or rendered useless because of contrary processes adopted by the agencies the Act was supposed to instruct. In this case, although the legal "letter of the law" may allow the Commission to designate this proceeding and others like it a "rulemaking," the result is to nullify the intent of other Congressional mandates. To the degree it can, the Commission should strive to meet those mandates. In many instances, particularly regarding rules that must be issued based on short time frames required by law, the Commission may be foreclosed from achieving such a result. However that is not the case here.

There is no Congressionally required time-frame. This proceeding was self-generated by the Commission. There are clear mandates from Congress, both as to the APA and the Regulatory Flexibility Act. They can be met.

CONCLUSION

For the foregoing reasons the Cable Telecommunications Association (CATA) respectfully requests that the Commission withdraw the above-captioned proceeding so that it can be re-issued as a Notice of Inquiry. The Initial Regulatory Flexibility Analysis required by Section 603 cannot be adequately or conscientiously undertaken until such time as the Commission actually produces a set of proposed rules (if it deems them necessary) and publishes them for comment. Until then, the Commission cannot truly comply with the intent and mandate of the Regulatory Flexibility Act.

Respectfully Submitted,



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